90-1845

Supreme Court, U.S.
FILED
MAY 29 1991
OFFICE OF THE CLERK

NO.

IN THE
SUPREME COURT OF THE UNITED STATES

October Term 1990

ROBERT E. FELKER,

Petitioner,

v.

STEPHEN A. HOULOOSE,
Chief Probation Officer, Probation and Parole Departments, 43rd Judicial District, Commonwealth of Pennsylvania,

Respondent.

WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI

William H. Robinson Jr.
Hiscott and Robinson
900 Scott Street
Stroudsburg, PA 18360
(717) 421-4721

Counsel of Record

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QUESTION PRESENTED FOR REVIEW

Is the Petitioner entitled to a writ of habeas corpus because he was denied his right to due process of law by a Pennyslvania trial judge who erroneously instructed the jury that under 75 Pa.C.S. § 3742--requiring motorists to stop and render assistance after accidents involving death or serious injury--the Petitioner could be convicted on the basis of simple negligence rather than on the basis of a knowing or reckless violation?

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OPINIONS BELOW

The decision of the United States District Court for the Middle District of Pennsylvania denying the Petition for Writ of Habeas Corpus was filed on August 24, 1990 and is set forth in the Appendix at A-1. The decision of the United States Court of Appeals for the Third Circuit affirming the district court was entered on February 28, 1991, and appears in the Appendix at A-12.

JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1). The final disposition of this case below was the Third Circuit's affirmance of the district court's denial of the Petitioner's Petition for a Writ of Habeas Corpus on February 28, 1991.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The fourteenth amendment states in part:

> nor shall any state deprive any person of life, liberty, or property without due process of law[.]

75 Pa.C.S. § 3742 states in part:

> Accidents involving death or personal injury
>
> (a) General rule.--The driver of any vehicle involved in an accident resulting in injury or death of any person shall immediately stop the vehicle at the scene of the accident or as close thereto as possible but shall then forth-

> with return to and in every event shall remain at the scene of the accident until he has fulfilled the requirements of section 3744 (relating to duty to give information and render aid). Every stop shall be made without obstructing traffic more than is necessary.
>
> (b) Penalties.--
>
> (1) Except as otherwise provided in this section, any person violating this section commits a misdemeanor of the third degree.

18 Pa.C.S. § 302(b) and (c) provides:

> General requirements of culpability
>
> . . . .
>
> (b) Kinds of culpability defined.--
>
> (1) A person acts intentionally with respect to a material element of an offense when:
>
> (i) if the element involves the nature of his conduct or a result thereof, it is his conscious object to engage in conduct of that nature or to cause such a result; and

(ii) if the element involves the attendant circumstances, he is aware of the existence of such circumstances or he believes or hopes that they exist.

(2) A person acts knowingly with respect to a material element of an offense when:

(i) if the element involves the nature of his conduct or the attendant circumstances, he is aware that his conduct is of that nature or that such circumstances exist; and

(ii) if the element involves a result of his conduct, he is aware that it is practically certain that his conduct will cause such a result.

(3) A person acts recklessly with respect to a material element of an offense when he consciously disregards a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that, considering the nature and intent of the actor's conduct and the circumstances known to him, its disregard involves a gross deviation from the standard of conduct that a reasonable per-

son would observe in the actor's situation.

(4) A person acts negligently with respect to a material element of an offense when he should be aware of a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that the actor's failure to perceive it, considering the nature and intent of his conduct and the circumstances known to him, involves a gross deviation from the standard of care that a reasonable person would observe in the actor's situation.

(c) Culpability required unless otherwise provided.--When the culpability sufficient to establish a material element of an offense is not prescribed by law, such element is established if a person acts intentionally, knowingly or recklessly with respect thereto.

18 Pa.C.S. § 1104 states:

Sentence of imprisonment for misdemeanors

A person who has been convicted of a misdemeanor may be sentenced to imprisonment for a definite term which shall be fixed by the court and shall be not more than:

(1) Five years in the case of a misdemeanor of the first degree.

(2) Two years in the case of a misdemeanor of the second degree.

(3) One year in the case of a misdemeanor of the third degree.

STATEMENT OF THE CASE

Sometime during the evening of February 26, 1987, a pedestrian on an unlighted street with no sidewalk in Stroudsburg, Pennsylvania, was struck and killed by a motor vehicle. There were no eyewitnesses to the accident, but several persons living on the street heard what they described as two thuds, following which the body was found.

The next morning, the Petitioner, Robert E. Felker, read about the accident in the newspaper. He had been driving on the street where the accident occurred at

or about the time of the accident and had hit the curb and knew that he had grazed a telephone pole. Felker did not cause any damage to the pole and was unaware at the time of the accident that he might also have struck a pedestrian, who apparently was in the highway. Upon reading the newspaper, Felker first realized that his vehicle might have struck a pedestrian. He immediately contacted his attorney, who called the local police and notified them of what Felker had told him.

After this call, a police officer visited Felker at his place of business and examined Felker's pickup truck, which showed signs of having recently been involved in a collision. Felker admitted that the truck was his and that he had been operating the truck the night before.

With Felker's consent, the truck was impounded at that time, and, the following day, Pennsylvania State Trooper Richard Sachs conducted an investigation of the accident, including a search of the truck. During his search of the truck, Sachs removed several pieces of physical evidence, including a mirror and grill.

Based upon the evidence seized, Sachs concluded that Felker's truck was the vehicle which struck the victim. Felker was then charged and, following a preliminary hearing, was bound over for trial under several statutes: Involuntary Manslaughter (18 Pa.C.S. § 2504(a)); Recklessly Endangering Another Person (18 Pa.C.S. § 2705); Homicide by Vehicle (75 Pa.C.S. § 3732); Reckless Driving (75 Pa.C.S. § 3714); Accidents Involving Death or Personal Injury (75 Pa.C.S. § 3742); Duty to Give Information and

Render Aid (75 Pa.C.S. § 3744(a)); and Driving Vehicle at Safe Speed (75 Pa.C.S. § 3361). As a result of a Motion to Quash, the court dismissed the charges of Involuntary Manslaughter, Homicide by Vehicle, and Recklessly Endangering Another Person.

At trial, the trial court dismissed the counts pertaining to Driving at Safe Speed and Duty to Give Information and Render Aid. At the conclusion of all testimony, the case was submitted to the jury on the two remaining counts, Accidents Involving Death or Personal Injury and Reckless Driving. The trial court instructed the jurors with regard to the hit-and-run statute that Felker could be convicted if they found that "the defendant knew or in the exercise of reasonable care should have known that his truck was involved in an accident resulting in in-

jury or death to a person" (Record at 362a (emphasis added)). This instruction was given over the objection of Felker, who argued that it erroneously permitted a conviction on the basis of a simple negligence standard, whereas the statute required a showing of knowledge or recklessness (R. at 376a).

Felker was ultimately convicted on both counts and was sentenced to one year of probation, a $2,500 fine, and 250 hours of community service. An appeal was taken to the Superior Court of Pennsylvania, which affirmed the convictions, and to the Supreme Court of Pennsylvania, in which Felker argued that his conviction based on the civil negligence standard violated both Article I, Section 9 of the Pennsylvania Constitution and the due process clauses of the fifth and fourteenth amendments to the United States

Constitution. The Pennsylvania Supreme Court denied Felker's Petition for Allowance of Appeal in a per curiam decision, and the United States Supreme Court denied a Petition for a Writ of Certiorari to the Pennsylvania Supreme Court.

Felker then filed a Petition for a Writ of Habeas Corpus in the District Court for the Middle District of Pennsylvania. The court, relying on the same reasoning as the state courts, denied the petition and declined to issue a certificate of probable cause for an appeal to the Third Circuit Court of Appeals. Felker next submitted a request for a certificate of probable cause to the Third Circuit, which denied his request on the merits on February 28, 1991.

ARGUMENT

THE PETITIONER IS ENTITLED TO A WRIT OF HABEAS CORPUS BECAUSE THE STATE TRIAL COURT AND APPELLATE COURT INTERPRETED A STATE CRIMINAL PROVISION IN A MANNER WHICH CHANGED THE ELEMENTS OF THE CRIME, THUS VIOLATING HIS DUE PROCESS RIGHTS.

The Petitioner, Robert E. Felker, was convicted for violating the provisions of 75 Pa.C.S. § 3742, which states in pertinent part:

> The driver of any vehicle involved in an accident resulting in injury or death of any person shall immediately stop the vehicle at the scene of the accident . . . until he has fulfilled the requirements of section 3744 (relating to duty to give information and render aid).

This provision does not, by its terms, provide for any mental culpability or mental state. Therefore, to determine the necessary mental state for a violation of § 3744, the provisions of 18 Pa.C.S. § 302 must be consulted. This

section states generally that, unless otherwise provided, "a person is not guilty of an offense unless he acted intentionally, knowingly, recklessly or negligently, as the law may require, with respect to each material element of the offense." Subsection (c) contains the necessary mental state applicable to this case:

> (c) Culpability required unless otherwise provided.--When the culpability sufficient to establish a material element of an offense is not prescribed by law, such element is established if a person acts intentionally, knowingly or recklessly with respect thereto.

(Emphasis added.) "Recklessly" is defined in subsection (b)(3), which provides that a person acts recklessly "when he consciously disregards a substantial and unjustifiable risk that the material element exists or will result from his conduct" (emphasis added). The subsec-

tion further states that the disregard of the risk must be a "gross deviation from the standard of conduct that a reasonable person would observe in the actor's situation."

By contrast, negligent conduct is described in subsection (b)(4) as when a person "should be aware of a substantial and unjustifiable risk that the material element exists" (emphasis added).

These provisions make it clear that the Pennsylvania legislature intended a conviction under § 3744 only in those circumstances in which the defendant intentionally, knowingly, or recklessly violated the provision. Significantly, a mere negligent violation is not, under the clear guidelines set forth, sufficient to constitute a violation.

Despite the unambiguous nature of the required mental state for a violation

of § 3744, the trial court instructed the jury in this case that mere negligence alone would support a conviction of Felker. In its charge to the jury, the trial court stated:

> The defendant is charged with a misdemeanor offense of violating a provision of the Motor Vehicle Code commonly known as Hit and Run. In order to find the defendant guilty of this charge, you must find that the Commonwealth has proven beyond a reasonable doubt the following elements:
>
> 1. that the defendant <u>knew or in the exercise of reasonable care should have known</u> that his truck was involved in an accident resulting in injury or death to a person.
>
> 2. that the defendant did not stop and remain at the scene of the accident in order to render aid and provide information.

(R. at 363a (emphasis added).) Obviously, the trial court substituted a simple negligence standard in lieu of the recklessness standard required by the stat-

ute. Thus, acting on this erroneous instruction, the jury could well have improperly convicted Felker on the basis that he should have known that he was involved in an accident involving death or injury.

This Court has long recognized that a conviction in state court violates federal due process provisions unless all of the elements of the state crime are proven beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307 (1979); Patterson v. New York, 432 U.S. 197 (1977); In re Winship, 397 U.S. 358 (1970). In this case, because of the improper jury instruction, all of the elements of the Pennsylvania statute cannot be said to have been proven beyond a reasonable doubt, because the jury was evaluating the case in light of the wrong element of mental intent. Thus, Felker's

due process rights were violated by the trial judge and by the refusal of the state appellate court to rectify the situation.

In essence, the due process violation in this case is the same as the failure of a state to give fair warning of the conduct which is criminal under a statute. This Court stated in United States v. Harris, 347 U.S. 612, 617 (1954):

> The constitutional requirement of definiteness is violated by a criminal statute that fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute. The underlying principle is that no man shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed.

In addition, this Court has applied this rule to situations in which the legislation itself was clear, but the courts ap-

plying it modified it so as to bring within the scope of the statute conduct which should not have been deemed criminal. In Bouie v. City of Columbia, 378 U.S. 347, 352 (1964), for example, the Court stated:

> There can be no doubt that a deprivation of the right of fair warning can result not only from vague statutory language but also from an unforeseeable and retroactive judicial expansion of narrow and precise statutory language. As the Court recognized in Pierce v. United States, 314 U.S. 306, 311, "judicial enlargement of a criminal act by interpretation is at war with a fundamental concept of the common law that crimes must be defined with appropriate definiteness."

The principle involved in this case was most directly addressed in a recent case from the Fifth Circuit Court of Appeals. In Baptist v. Blackburn, 786 F.2d 704 (5th Cir. 1986), the defendant was convicted of armed robbery in a Louisiana state trial, although there was a con-

flict in the evidence as to whether the defendant had actually had a gun during the robbery. The trial court instructed the jury that "if the victim thinks the man has a gun and surrenders his money to him, then it is armed robbery." Id. at 705. However, the statute defining armed robbery required that the robber commit theft by force or intimidation "while armed with a dangerous weapon." Id. Despite this clear error in instruction, the Louisiana appellate court refused to reverse the defendant's conviction.

The Fifth Circuit found that by instructing the jury that armed robbery can result from the victim's mere subjective belief in the presence of a weapon, the trial judge reformulated the definition of the crime. Because the instructions given at trial did not adequately describe the elements of armed robbery as

contained in the Louisiana statute, the defendant's right to a fair trial was denied. Id. at 706. In the words of the court:

> Once the legislature of such a state as Louisiana defines a crime, due process requires the state's courts to follow its definition or, at the least, to refrain from expanding it to delete significant elements of the definition ex post facto.

Id.; see also Prantil v. California, 843 F.2d 314 (9th Cir. 1988) (recognizing rule that erroneous instructions on state law crime can constitute violation of federal due process clause); Darnell v. Swinney, 823 F.2d 299 (9th Cir. 1987), cert. denied, 108 S. Ct. 1012 (1988) (same).

It should be noted that while the both the district court and the state courts below relied on Commonwealth v. Kauffman, 323 Pa. Super. 363, 470 A.2d 634 (1983), for the holding that a simple

negligence standard was appropriate in a hit-and-run case, the Kauffman case involved a different statute, 75 Pa.C.S. § 3743, which under the legislative scheme is a "summary offense" carrying a different maximum prison sentence and different culpability standards. See 18 Pa.C.S. § 305 (permitting simple negligence standard in summary offenses); 18 Pa.C.S. § 106(c) (summary offenses include those with a maximum prison term of 90 days). By contrast, the maximum sentence under 75 Pa.C.S. § 3742(a) is one year. See 75 Pa.C.S. § 3742(b)(1); 18 Pa.C.S. § 1104 (defining length of sentence in misdemeanor cases; one year in the case of a misdemeanor of the third degree). Thus, despite the conclusions of the district court, the Kauffman case could have no bearing on the culpability requirement in this case.

In short, because of the erroneous jury instruction given by the trial court, Felker was denied his right to a fair trial and his right to due process of law under the fourteenth amendment to the United States Constitution. The appellate court reviewing his conviction merely compounded the error of the trial court by failing to recognize that the trial court had enlarged the elements of the crime by permitting conviction on the basis of negligence rather than on the knowing or grossly reckless standard required by the statute. Because the state courts arbitrarily refused to follow the definition of the crime as contained in the statute, due process requires the granting of a writ of habeas corpus to release Felker from a conviction which violated due process. The district court

and Third Circuit erred in failing to grant the writ of habeas corpus.

CONCLUSION

For all of the foregoing reasons, the Petitioner, Robert E. Felker, requests this Court to grant his Petition for Writ of Certiorari.

Respectfully submitted,

William H. Robinson Jr.
Hiscott and Robinson
900 Scott Street
Stroudsburg, PA 18360
(717) 421-4721

Counsel of Record

NO.

IN THE
SUPREME COURT OF THE UNITED STATES

October Term 1990

ROBERT E. FELKER,

Petitioner,

v.

STEPHEN A. HOULOOSE,
Chief Probation Officer, Probation and Parole Departments, 43d Judicial District, Commonwealth of Pennsylvania,

Respondent.

WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

APPENDIX

William H. Robinson Jr.
Hiscott and Robinson
900 Scott Street
Stroudsburg, PA 18360
(717) 421-4721

Counsel of Record

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IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

ROBERT E. FELKER	:	
	:	
Petitioner	:	
	:	
vs.	:	CIVIL NO. 90-0399
	:	(Judge Kosik)
STEPHEN A. HOULOOSE	:	
	:	
Respondent	:	

MEMORANDUM

Currently before the court is a petition for a writ of habeas corpus pursuant to 28 U.S.C. §2254 filed on February 27, 1990. On July 17, 1990, United States Magistrate J. Andrew Smyser filed a report in which he recommended that the petition be denied. On July 23, 1990, the petitioner filed objections to the Magistrate's report.

When objections are filed to a Magistrate's report, we must make a de novo determination of those portions of the report to which objections are made. In

so doing, we may accept, reject or modify, in whole or in part, the findings or recommendations made by the Magistrate. 28 U.S.C. §636(b)(1); Local Rule 904.2.

As this court previously indicated,[1] the facts related by the petitioner are as follows. On February 26, 1987 the petitioner hit a telephone pole while driving on an unlighted street. He stopped, saw that the pole was not damaged and continued on. The next morning, the petitioner read in the newspaper that sometime during the evening of February 26, 1987 a pedestrian had been struck and killed by a motor vehicle on the same street where the petitioner had hit the telephone pole. Realizing that he might have hit someone, the petitioner immediately called his attorney, who in turn contacted the local police and noti-

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[1] See Doc. 22.

fied them of what the petitioner had told him. After a police investigation, which included an examination of the petitioner's pick-up truck, the petitioner was indicted. Following a jury trial, the petitioner was convicted on two counts: [1] Accidents Involving Death or Personal Injury, 75 Pa.C.S.A. §3742; and [2] Reckless Driving, 75 Pa.C.S.A. §3714.

The instant petition challenges the trial court's instructions to the jury as to the culpability element required to be proven by the prosecution to support a conviction under §3742(a). 75 Pa.C.S.A. §3742(a) provides as follows:

> The driver of any vehicle involved in an accident resulting in injury or death of any person shall immediately stop the vehicle at the scene of the accident or as close thereto as possible but shall then forthwith return to and in every event shall remain at the scene of the accident until he has fulfilled the requirement of section 3744 [relating to duty

> to give information and render aid]. Every stop shall be made without obstructing traffic more than is necessary.

The trial judge gave the following instruction concerning the element of culpability to be applied by the jury:

> If the evidence convinces you beyond a reasonable doubt that while driving his truck the defendant was involved in an accident which he knew or in the exercise of reasonable care should have known resulted in injury or death to a person and he did not fulfill the duty to stop and render aid and provide information, you should find the defendant guilty. Otherwise, you must find the defendant not guilty.[2]

The petitioner argues that this instruction allowed him to be erroneously convicted on the basis of a finding of a mere lack of reasonable care. The petitioner argues that the appropriate standard of culpability for the crime with

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[2]See Doc. 11, Transcript of the Trial at page 344.

which he was charged was that of reckless conduct as set forth in Section 302 of the Crimes Code.[3]

In support of this conclusion, the petitioner points to Commonwealth v. Heck, 517 Pa. 192, 535 A.2d 575 (1987). In Heck, the Supreme Court of Pennsylvania held that the minimum requirements of culpability set forth in 18 Pa.C.S.A. §302(a) apply to the offense of homicide by vehicle. Thus, the petitioner argues that Heck requires that the minimum culpability requirements of §302, i.e., reckless conduct, should have been sup-

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[3]18 U.S.C. §302(c) provides as follows:

> Culpability required unless otherwise provided.- When the culpability sufficient to establish a material element of an offense is not prescribed by law, such element is established if a person acts intentionally, knowingly or recklessly with respect thereto.

plied to the jury on his charge of accidents involving death or personal injury under 75 Pa.C.S.A. §3742(a). We do not agree.

As the Magistrate's report correctly points out, the holding in Heck only addressed the minimum culpability requirements for the offense of homicide by vehicle, 75 Pa. C.S.A. §3732;[4] See Commonwealth v. Safrit, 517 Pa. 484, 538 A.2d 1335 (1988). As such, the Heck decision

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[4]75 Pa.C.S.A. §3732 provides as follows:

> Any person who unintentionally causes the death of another person while engaged in the violation of any law of this Commonwealth or municipal ordinance applying to the operation or use of a vehicle or to the regulation of traffic except section 3731 (relating to driving under influence of alcohol or controlled substance) is guilty of homicide by vehicle, a misdemeanor of the first degree, when the violation is the cause of death.

does not hold or necessarily imply that Section 302(c) supplies the minimum standard of culpability for the offense of accidents involving death or personal injury.

We believe that the proper standard of culpability for the crime with which the petitioner was charged was expressed by the Superior Court of Pennsylvania in Commonwealth v. Kauffman, 323 Pa. Super. 363, 470 A.2d 634 (1983). In Kauffman, the Superior Court held that the duty to stop under 75 Pa.C.S.A. §3743,[5] accidents

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[5]75 Pa.C.S.A. §3743 provides as follows:

> (a) General rule. - The driver of any vehicle involved in an accident resulting only in damage to a vehicle or other property which is driven or attended by any person shall immediately stop the vehicle at the scene of the accident or as close thereto as possible but shall forthwith return to and in every event shall remain at the scene of the accident until

involving damage to attended vehicle or property, arises whenever a driver knows, or in the exercise of reasonable care should know, that his vehicle has been involved in an accident. Id., 323 Pa. Super. ___, 470 A.2d 640. Although it is true that Kauffman involved damage to attended vehicle or property as opposed to death or personal injury, as here, we cannot believe that drivers should be held to a lesser degree of culpability where accidents involve persons as opposed to property. As the Superior Court stated in Kauffman, "To hold otherwise would advise drivers to remain oblivious, howsoever unreasonably, to the effects of their driving on follow motorists." Id.

> he has fulfilled the requirements of section 3744 [relating to duty to give information and render aid]. Every stop shall be made without obstructing traffic more than is necessary.

As a result, we believe that the contested portion of the trial judge's instruction was correct and was consistent with the duty imposed upon drivers under 75 Pa.C.S.A. §3742.

Accordingly, the instant petition for a writ of habeas corpus shall be denied.

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

ROBERT E. FELKER	:	
	:	
Petitioner	:	
	:	
vs.	:	CIVIL NO. 90-0399
	:	(Judge Kosik)
STEPHEN A. HOULOOSE	:	
	:	
Respondent	:	

ORDER

AND NOW, this 24 day of August, 1990, IT IS HEREBY ORDERED THAT:

[1] the recommendation contained in the Magistrate's July 17, 1990 report is adopted;

[2] the instant petition for writ of habeas corpus is denied;

[3] the Clerk of Court is directed to close this case and forward a copy of this Memorandum and Order to United States Magistrate J. Andrew Smyser; and

[4] any appeal of this order shall be deemed frivolous, without probable cause and not taken in good faith.

/s/
Edwin M. Kosik
United States District Judge

February 21, 1991

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

C.A. No. 90-5813

ROBERT E. FELKER

vs.

STEPHEN A. HOULOOSE

(M.D. Pa. Civ. No. 90-0399)

Present: CHIEF JUDGE SLOVITER, SCIRICA AND SEITZ, CIRCUIT JUDGES

Submitted is appellant's request for a certificate of probable cause pursuant to Rule 22(b), Federal Rules of Appellate Procedure

in the above-captioned case.

Respectfully,

_____/s/
Clerk

SM/TCT/ecc
enc.

The foregoing request by appellant for a certificate of probable cause is denied on the merits, Granberry v. Greer, 481 U.S. 129 (1987).

By the Court,

_____/s/
Circuit Judge

Dated: Feb. 28, 1991